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Metrojaya Bhd & Anor v BTC Clothier Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-471-1995
SYED AHMAD IDID J
B 31 JANUARY 1996

Civil Procedure *— Time — Defence — Extension of time to file — Whether defence filed out of time to be considered — Considerations of the court*

C On 24 August 1995, the plaintiffs filed an action against the defendants for, inter alia, an injunction restraining the defendants from passing off their clothing and weaving apparel under the name of 'BritishIndia' as that of the plaintiffs' 'EastIndia Company' and for the delivery of those clothing and apparel bearing the trade mark 'BritishIndia'. The writ and statement of claim was served on the defendants on 4 D September 1995 and the defendants entered appearance on 8 September 1995. The time limited for filing the defence expired on 25 September 1995. On 3 October 1995, the defendants' solicitors requested for an extension of time to file the defence over the telephone; that verbal request was followed by a letter dated 4 October 1995. On the same day, the plaintiffs filed an application to E enter judgment in default of defence. On 5 October 1995, the plaintiffs wrote a letter refusing the request for an extension of time. On 12 October 1995, the defendants filed and served a defence and counterclaim, together with an application for an extension of time to file defence. On 19 October 1995, the plaintiffs filed an application to set aside the defence. The issue before the court was whether the F defendants' application for an extension of time to file their defence should be granted.

Held, allowing the defendants' application:

G (1) In so far as procedural non-compliance is concerned, the court would always weigh the default as against the achievement of justice as a whole. A defence delivered out of time must nevertheless be considered (see p 48F–G); *Thomas v Booty, Edwards & Partners* [1964] MLJ 359, *Idris bin Hj Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141, *Gill v Woodfin* (1884) 25 H Ch D 707 and *Gibbings v Strong* (1884) 26 Ch D 66 followed.

(2) The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in its application. The defendants in this case showed that there was a real dispute as to the subject matter of the suit. It was a waste of time to shut I out the defence because immediately judgment in default was given, the defendants would apply to set it aside (see p 49E–I); *Foo Chiew Fong v Guriman* [1957] MLJ 51, *MJH Sdn Bhd v Jurong Granite Industries Sdn Bhd* [1991] 3 CLJ 2885 and *Thomas v Booty, Edwards & Partners* [1964] MLJ 359 followed.

[**Bahasa Malaysia summary**

Pada 24 Ogos 1995, plaintif-plaintif telah memfailkan suatu tindakan terhadap defendan-defendan untuk, antara lainnya, satu injunksi menghalang defendan-defendan daripada kelirupaan pakaian-pakaian dan pakaian tenunan mereka di bawah nama 'BritishIndia' sebagai pakaian 'EastIndia Company' kepunyaan plaintif-plaintif dan untuk hantar-serahan pakaian-pakaian tersebut yang mempunyai tanda niaga 'BritishIndia'. Writ dan pernyataan tuntutan telah disampaikan ke atas defendan-defendan pada 4 September 1995 dan defendan-defendan telah memasukkan kehadiran pada 8 September 1995. Masa yang dihadkan untuk memfailkan pembelaan tamat tempohnya pada 25 September 1995. Pada 3 Oktober 1995, peguamcara defendan-defendan telah memohon untuk suatu perlanjutan masa untuk memfailkan pembelaannya melalui telefon; permintaan secara lisan itu kemudiannya diikuti dengan sepucuk surat yang bertarikh 4 Oktober 1995. Pada hari yang sama, plaintif-plaintif telah memfailkan suatu permohonan untuk memasukkan penghakiman ingkar pembelaan. Pada 5 Oktober 1995, plaintif-plaintif telah menulis sepucuk surat yang menolak permintaan untuk perlanjutan masa tersebut. Pada 12 Oktober 1995, defendan-defendan telah memfailkan dan menyampaikan suatu pembelaan dan tuntutan balas, bersama dengan suatu permohonan untuk perlanjutan masa untuk memfailkan pembelaan. Pada 19 Oktober 1995, plaintif-plaintif telah memfailkan suatu permohonan untuk mengetepikan pembelaan tersebut. Isu di hadapan mahkamah adalah sama ada permohonan defendan-defendan untuk perlanjutan masa untuk memfailkan pembelaan mereka harus diberikan.

Diputuskan, membenarkan permohonan defendan:

(1) Sejauh mana ketidakpatuhan prosedur adalah berkenaan, mahkamah akan selalu mempertimbangkan keingkaran tersebut menentang pencapaian keadilan secara keseluruhannya. Satu pembelaan yang disampaikan di luar masa walau bagaimanapun mesti dipertimbangkan (lihat ms 48F–G); *Thomas v Booty, Edwards & Partners* [1964] MLJ 359, *Idris bin Hj Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141, *Gill v Woodfin* (1884) 25 Ch D 707 dan *Gibbings v Strong* (1884) 26 Ch D 66 diikut.

(2) Mahkamah-mahkamah dalam kes yang bersifat begini lebih suka jika ianya diputuskan atas merit dan tidak menggunakan kaedah-kaedah prosedur untuk menghalang seorang defendan daripada membela suatu tindakan kecuali jika ianya tidak mempunyai merit dalam permohonannya. Defendan-defendan di dalam kes ini telah menunjukkan bahawa terdapat suatu pertelingkahan yang benar berkenaan perkara guaman. Adalah membuang masa untuk menyingkir pembelaan itu kerana sebaik sahaja penghakiman ingkar pembelaan diberikan, defendan-defendan akan memohon untuk mengetepikannya (lihat ms 49E–I); *Foo Chiew Fong v Guriman* [1957] MLJ 51, *MJH Sdn Bhd v Jurong*

A *Granite Industries Sdn Bhd* [1991] 3 CLJ 2885 dan *Thomas v Booty, Edwards & Partners* [1964] MLJ 359 diikut.]

Notes

For cases on extension of time, see 2 *Mallal's Digest* (4th Ed, 1994 B Reissue) paras 3566–3577.

Cases referred to

Foo Chiew Fong v Guriman [1957] MLJ 51
Gibbings v Strong (1884) 26 Ch D 66
C *Gill v Woodfin* (1884) 25 Ch D 707
Idris bin Hj Salleh v Federal Auto Holdings Bhd [1979] 2 MLJ 141
MJH Sdn Bhd v Jurong Granite Industries Sdn Bhd [1991] 3 CLJ 2885
Thomas v Booty, Edwards & Partners [1964] MLJ 359

Mohamed Ismail Shariff & K Thavakumar (*Mohamed Ismail & Co*) for D the plaintiffs.
Gurmeet Kaur (*Shearn Delamore & Co*) for the defendants.

Syed Ahmad Idid J: There are three applications before the court, ie:

(1) The plaintiffs' application to enter judgment in default of defence E (encl 3);

(2) The defendants' application for extension of time to file the defence (encl 6);

(3) The plaintiffs' application to set aside the defence and counterclaim filed out of time (encl 7).

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The facts relevant to these applications are as follows:

(1) On 24 August 1995, the plaintiffs filed a writ and statement of claim for, inter alia, an injunction restraining the defendants from passing off the defendants' clothing and wearing apparels under the name of G 'BritishIndia' as that of the plaintiffs' 'EastIndia Company' and for the delivery of the clothing and weaving apparel bearing the trade mark 'BritishIndia';

(2) On 4 September 1995, the writ and statement of claim was served on the defendants;

H (3) On 8 September 1995, the defendants entered appearance;

(4) On 25 September 1995, time to file the defence expired;

(5) On 3 October 1995, Mr Wong Sai Fong, the defendants' solicitor, telephoned the plaintiffs' solicitor for an extension of time to file the defence, this was followed by a letter dated 4 October 1995;

I (6) On 4 October 1995, the plaintiffs filed an application to enter judgment in default of defence;

(7) On 5 October 1995, the plaintiffs wrote a letter refusing the extension of time;

(8) On 12 October 1995, the defence and counterclaim was filed and served, together with an application for extension of time to file defence; A

(9) On 19 October 1995, the plaintiffs filed an application to set aside the defence.

I shall deal with encl 6 first since the outcome of encls 3 and 7 would depend upon my finding on encl 6. B

In support of encl 6, the defendants' solicitor affirmed in his affidavit (encl 5) that the reason for the delay was because he was under the impression that the parties were in the process of global settlement (there being various suits pending between the plaintiffs and defendants). A letter from the plaintiffs' solicitor to that effect was exhibited (exh WSF I). Upon realizing later that there was no negotiation afoot at the relevant time, he then had to take some time to familiarize himself with the facts and circumstances of the related suits before he could file in the defence. C

The application in encl 6 is purely procedural in nature, involving entirely the discretionary powers of the court. Counsel for the plaintiffs had, in opposing the application, urged the court to examine the facts surrounding the other suits, in particular the fact that the defendants had on 18 September 1995 served a winding-up petition (D5–28–290–95) against the second plaintiff and the petition was advertised on 19 September 1995. Such being the situation, the plaintiffs submitted that that could not be part of a negotiation in good faith. D E

Insofar as procedural non-compliance is concerned, the court would always weigh the default as against the achievement of justice as a whole. It had been stated in *Thomas v Booty, Edwards & Partners* [1964] MLJ 359 at p 360 by Wylie CJ (Borneo) as follows: F

> We are concerned only with the application of rules of procedure. These applications should not amount to a denial of the principles of justice. It is for these reasons that extensions of time are usually granted as a matter of course, unless there are very strong circumstances to show that these are delaying tactics or some major feature of that nature. G

There have been ample authorities to establish the rule that a defence delivered out of time must nevertheless be considered. In the case of *Idris bin Hj Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141, Syed Agil Barakbah J (as he then was) cited and followed the case of *Gill v Woodfin* (1884) 25 Ch D 707 (CA) and *Gibbings v Strong* (1884) 26 Ch D 66 (CA) in allowing the defendants' application for extension of time to file their defence. The relevant part of his Lordship's judgment is reproduced below: H

> Under O 21 r 6 of the Rules of the Supreme Court, a defendant is required to deliver his defence after having entered an appearance within 14 days from the time limited for appearance or from the delivery of the statement of claim, whichever is the later ... The accepted rule under this is that a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice for judgment under this rule (see *Gill v Woodfin* (1884) 25 Ch D 707). In such a case the I

court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done (see *Gibbings v Strong* (1884) 26 Ch D 66).

In *Gill*'s case, the defendant made default in putting in a statement of defence and the plaintiff gave notice of motion for judgment in default of defence. It was held by the Court of Appeal that the statement of defence, though put in after time, could not be treated as a nullity and that the plaintiff was not entitled to judgment in default of defence.

In *Gibbings*'s case, the court refused to look at the defence and gave judgment according to the statement of claim in which the appellant brought an action against the respondent and another asking for an account, foreclosure and for payment of the bill of costs into court. The Court of Appeal treated the case as one for an account or taxation and held that the plaintiff was not entitled to an order on the bill of costs but only an account of what was done in respect of the costs. At p 70, Cotton LJ said:

> I think it is the duty of a judge, when an action comes before him on motion for decree in default of pleading, to look at everything the knowledge of which may enable him to do justice between the parties. The plaintiff was entitled to move under O XXIX r 10, but, especially having regard to r 14, I do not think that where a defence has actually been put in, r 10 can be construed as obliging the court to pay no attention to it, because it was put in after time and without leave.

In the present case, judgment in default has not yet been obtained. The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in its application (per Mathew CJ in *Foo Chiew Fong v Guriman* [1957] MLJ 51 (CA) at p 52).

In the more recent case of *MJH Sdn Bhd v Jurong Granite Industries Sdn Bhd* [1991] 3 CLJ 2885, James Foong JC (as he then was) cited with agreement the following views of Earl of Selborne LC in *Gibbings*:

> ... and if a defence has been put in, though irregularly, I think the court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply, under r 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits.

The defence in the present case shows that there is a real dispute as to the ownership of the brand name 'EastIndia' and the property in the 'get-up' of EastIndia stores. I agree that it is a waste of time to shut out a defence. This is because, immediately judgment is given in default, the defendants would apply to set it aside (per Wylie CJ (Borneo) in *Thomas*'s case). Furthermore, the delay in filing was only for about two weeks. Had the period been longer, then the question of laches may be considered.

I would prefer that this matter be heard on the merits. This will not in any way prejudice the plaintiff's case.

As such, the defendants' application for extension of time is allowed but with costs to the plaintiffs. The plaintiffs would in turn be given two weeks from today to file in their reply and defence to the counterclaim. The plaintiffs' applications in encls 3 and 7 are hereby dismissed.

Defendants' application allowed.

Reported by CK Ong